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No. 35

IN THE

Supreme Court of the United States

October Term, 1955.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ABRAHAM MINKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Respondent

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SUPREME COURT OF THE UNITED STATES.

October Term, 1955. No. 35.

UNITED STATES OF AMERICA,
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ABRAHAM MINKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 16-21) is reported at 217 F. 2d 350. The memorandum opinion of the District Court in the prior proceedings to quash the subpoena, *In re Minker*, is reported at 118 F. Supp. 264.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 1, 1954 (R. 21), and a petition for rehearing was denied on January 6, 1955 (R. 22). On January 29, 1955, by order of Mr. Justice Burton (R. 22), the time for filing a petition for a writ of certiorari was extended to March 7, 1955. The petition was filed on February 28, 1955, and was granted on April 11, 1955 (R. 23; 349 U. S. 904). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether, under the subpoena power conferred by Section 235(a) of the Immigration and Nationality Act of 1952, an immigration officer may subpoena a naturalized citizen to appear before him and testify in order for the Government to determine whether possible grounds exist for the institution of proceedings seeking the revocation of his citizenship.

2. Whether, under our separation of powers theory of government, the above subpoena power may be constitutionally delegated to an immigration officer.

3. Whether this application of the above subpoena power is a violation of due process.

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED.

Constitutional provisions, pertinent portions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 et seq., and the applicable regulations of the Immigration and Naturalization Service are set forth as an Appendix, *infra*, pp. 24-35.

STATEMENT.

On September 8, 1953, the District Director of Immigration and Naturalization, at Philadelphia, Pennsylvania, issued a subpoena directed to respondent commanding him to appear and testify at the District Office of the Immigration and Naturalization Service located in the Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pa., on September 16, 1953 (R. 3). On September 11, 1953, a motion was filed to quash the subpoena on the grounds (1) that it did not disclose the nature of the investigation, (2) that there was no authority or jurisdiction for an immigration officer to subpoena the attendance and testimony of a person who is a citizen of the United States against himself, and (3), that its provisions were unreasonable and oppressive (R. 12).

At the argument on the motion, it was admitted by the Government that respondent was a naturalized citizen of the United States who was admitted to citizenship in 1945; that an investigation was pending by the Immigration and Naturalization Service in connection with the possible institution of proceedings seeking the revocation of his citizenship; that the testimony sought from respondent concerned *only himself*; that at the time he was served with the sub-

poena he was a resident of Reading, Pennsylvania, and had resided there for over forty years (R. 17). The motion to quash was denied (R. 16; *In re Minker*, 118 F. Supp. 264).

The District Director thereupon notified respondent to appear on January 5, 1954, in accordance with the terms of the original subpoena and advised him that his attendance is commanded in order that he should give testimony "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451)" (R. 4).

Upon his failure to comply, the District Court, on application of the District Director, entered an order on March 29, 1954, directing that the respondent appear and testify before the District Director of Immigration and Naturalization or his duly authorized delegated representative at such time as the District Director shall, upon not less than ten days' written notice require (R. 5). No appeal was taken from this order. *Loufakis v. United States*, 75 F. 2d 627 (C. A. 3); *Cogen v. United States*, 278 U. S. 221. A hearing was fixed by the District Director of Immigration and Naturalization on May 13, 1954; the respondent did not appear and testify. On June 3, 1954, after a hearing, respondent was adjudged in contempt and fined five hundred dollars (R. 9-10). On appeal the judgment was reversed, the Court of Appeals stating: "We conclude that a citizen confronted with an administrative proceeding which poses a challenge to his right to retain citizenship is not to be regarded as a 'witness' within the meaning of Section 235 (a) or required under that Section to appear and testify against himself" (R. 20).

SUMMARY OF ARGUMENT.

A. The plain language of Section 235 (a) empowering the Attorney General and any immigration officer to subpoena *witnesses* for testimony, "relating to the privilege of any *person* to enter, re-enter, reside in, or pass through the United States *or* concerning any matter which is material or relevant to the enforcement of this Act and administration of the Service," (Emphasis supplied) does not *authorize* an immigration officer to subpoena respondent, a naturalized citizen, to appear before him and testify in order for the Government to determine whether possible grounds exist for the institution of denaturalization proceedings against the respondent.

The word "witnesses" as used in Section 235 (a) means exactly what Congress said—witnesses. The Government contends that the word "witnesses" embraces all persons including naturalized citizens who must testify concerning their "privilege" to enter or reside in the United States or any other "matter". No such meaning can possibly be squeezed out. If Congress had wanted to grant to the Immigration and Naturalization Service the right to subpoena all persons in all "matters" including their own denaturalization proceedings, it could have easily said so, but there is not the slightest hint anywhere that Congress had such intention.

This plain meaning is fortified by the context of the entire section 235 (a) which is concerned with the entry and exclusion of aliens and is so titled; by other sections of the statute; by the legislative history which cautions against the use of this section to harass citizens; by the fact that in Section 340, of the same statute, Congress carefully outlined a judicial procedure to accomplish denaturalization; by the various rules of statutory interpretation which teach that statutes touching the liberties of all citizens

must be construed not esoterically but liberally; all these methods utilized, conclusively reveal that the sole purpose of Section 235 (a) was to investigate aliens and not to subpoena citizens in their own denaturalization cases.

The Government's chief contention, that Section 235 (a) contains a general grant of subpoena power (U. S. Br. 27), is without merit, since Congress specifically granted the power to subpoena in Section 335 (b) for pre-naturalization examinations. If the general power to subpoena existed by virtue of Section 235 (a), this separate grant of subpoena power in Section 335 (b) would not have been necessary.

B. The judicial power of the United States is vested in our Courts. Since a judgment of naturalization is a judgment like all other judgments of a court of record, final and conclusive on all parties, the subpoena power as applied in this case would violate our separation of powers theory of Government. Proceedings to open a judgment of naturalization are judicial in nature not administrative. A judgment of naturalization may be attacked, but only by court action and not by an immigration officer.

The Government's contention that the doctrine of *United States v. Morton Salt Company*, 338 U. S. 632, permits the subpoena action in this case is quite erroneous. In the *United States v. Morton Salt Company*, supra, at pages 638, 639, Justice Jackson speaking for this Court declared:

> "It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission. Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility 'to initiate contempt proceedings for the violation of this decree.' This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not

cause for such a proceeding. The decree also required the original report showing the manner and form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established."

The Immigration and Naturalization Service has no such "continuing duty" by statute, to check on citizens who have become naturalized. The entry of a judicial decree conferring citizenship is final and absolute. Congress did not leave to the Immigration and Naturalization Service the "residual duty" to reexamine the citizen in pre-denaturalization hearings. A judicial remedy was *specifically* provided for revocation proceedings in Section 340 of the Immigration and Nationality Act.

C. If the essence of due process is "fair play," compelling a citizen many years after he has been naturalized to supply his own dossier to an immigration officer conducting a denaturalization investigation shockingly violates our American concept of "fair play".

Immigration officers could subpoena over and over again a naturalized citizen—perhaps one who has obtained his citizenship over their objections—in order to find "good cause". Res judicata would not apply to such administra-

tive actions. After citizenship was conferred upon respondent by a judicial decree, to attempt to deprive him of the full benefit of that decree in this non-judicial proceeding, is a "taking" of his liberty without due process.

This Court should not construe the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act so that the Government may treat a naturalized citizen as if he were still an alien.

ARGUMENT.

I.

An immigration officer has no power under Section 235 (a) of the Immigration and Naturalization Act to subpoena a naturalized citizen to appear before him and give testimony in order to determine whether possible grounds exist for the institution of proceedings seeking revocation of his citizenship.

A. The plain statutory language, the context in which Section 235 (a) appears, the legislative history and the spirit of the statute sustain this conclusion.

1. The Government relies for its authority to subpoena the respondent, a naturalized citizen, to give testimony before an officer of the Immigration and Naturalization Service "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451)" (R. 4), on the following sentence scooped out of Section 235 (a) of the Act:

> "The Attorney General and any immigration officer, including special inquiry officers, shall have power to

require by subpoena the attendance and testimony of *witnesses* before immigration officers and special inquiry officers and the production of books, papers and documents relating to the *privilege* of any person to enter, re-enter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service, and to that end may invoke the aid of any court of the United States." (Emphasis supplied.)

This reliance is clearly erroneous. The Government's strained and tortured interpretation of Section 235 (a) is plainly refuted by the literal language and meaning of the sentence itself. The word "witnesses" means exactly what it says, witnesses, and special kind of witnesses, witnesses, "relating to the privilege of any person to enter. * * *" The phrase, "or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service" is specifically limited by what precedes.

The plain purpose[4] of Section 235 (a) was to permit an inspection and examination of all persons who were seeking to enter the United States in order to exclude those who had no "privilege" to enter or reside[5] and to obtain evidence to achieve this purpose. No other meaning should be squeezed out. The very section on which the Government

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[4]The Immigration and Nationality Act of 1952 should be read in its entirety to understand its design, not just a single sentence. Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529, 537 (1947).

[5]Section 235 (a) of the Act is listed under Chapter 4 "Provisions Relation to Entry and Exclusion" 66 Stat. 163 (1952). Significantly the regulations promulgated by the Immigration and Naturalization Service that apply to Section 235 (a) under the Act, 8 C. F. R. Part 235 (1953), are entitled "Inspection of Aliens Applying for Admission."

relies for its authority to subpoena the respondent explains the meaning of the word "person" as used in the context in which it occurs:

> "The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and where such action may be necessary, to make a written record of such evidence." (Emphasis supplied.)

A word is judged by the company it keeps. The word "person" is clearly used in this sentence as meaning an individual who is suspected of being an alien; the meaning does not change two sentences later. Section 235 (a) goes on to provide that:

> "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently, and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in Section 1182 of this title."

None of these questions could be asked by an immigration officer if he *knew* that the person was a United States citizen. It is certainly not a "privilege" for a citizen to enter, re-enter, or reside in the United States—it is an abso-

lute right,[3] unlike the position of an alien who seeks admission to this country. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537.

The language employed in the statute is at least, if not conclusive, the foremost guide to legislative intention. *United States v. American Trucking Association*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 390-5.

Since the Government *conceded* that respondent is a naturalized citizen of the United States, the immigration officer had no authority or jurisdiction[4] to subpoena respondent for examination; and therefore the District Court could not properly order him to respond "to a subpoena issued under this subsection."

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[3] President Eisenhower in a letter to Senator Arthur V. Watkins on April 6, 1953, wrote:

"In the State of the Union Message I pointed out that 'existing legislation contains injustices'. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:

. . . . . .

The provision which permits an immigration official to interrogate without warrant 'any alien or person believed to be an alien as to his right to be or to remain in the United States'. It is said that unless the word 'believe' is clarified so as specifically to require 'probable cause', an abuse of this authority could possibly subject any citizen to improper interrogation." N. Y. Times, April 28, 1953, p. 1, col. 2. The President was referring to Section 287(a) of the Act, but his remarks are equally applicable to Section 235(a).

[4] In **United States v. Watkins**, 165 F. 2d 1017, 1018 (C. C. A. 2nd 1948), the Court stated: "Whether the appellant's detention is unlawful depends, as he well says, upon whether he is an alien. If he is a citizen, he was unlawfully detained, for neither the Director of Immigration and Naturalization nor a Board of Special Inquiry has any power to exclude a citizen."

In **Ng Fung Ho v. White**, 259 U. S. 276, 285, this Court stated, "Jurisdiction in the Executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."

2. The Immigration and Nationality Act of 1952 is an organism and Section 235 (a) must be placed in the context of the legislation as a whole. The preceding section 234 provides for the physical and mental examinations of persons seeking admission; and Section 236 logically provides for special inquiry if the arriving alien is detained: "* * * Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section * * * and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry which shall be kept separate and apart from the public, the alien may have one friend or relative present." Again, "person" here means alien or one who is suspected of being an alien. So viewed, it precludes the esoteric interpretation of Section 235 (a) urged by the Government.

Section 340 of the Act provides for judicial revocation of naturalization.[5] The normal place for the statutory power to subpoena a naturalized citizen in connection with possible denaturalization proceedings would be in Section 340. "Its absence is persuasive evidence that Congress did not intend to create a new method of obtaining evidence in denaturalization proceedings." See Section 340 (i), (j).

In *Johannessen v. United States*, 225 U. S. 227, this significant language appears:

> "It (the statute) merely provides that, on good cause shown, the question whether one who claims the privi-

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[5] Since the statute prescribes that good cause must be shown for institution of denaturalization proceedings, this provision would be circumvented by an administrative proceeding involving the party litigant at the time when admittedly no good cause existed, since if it did the complaint in denaturalization proceedings would be filed.

[6] When Congress changed the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact, or by wilful misrepresentation, the Senate and House Reports accompanying the Bills specifically referred to this change. S. Rep. No. 1137, 82d Cong. 2d Sess., p. 45; H. Rep. No. 1365, 82d Congress 2d Sess., pp. 82, 83.

lege of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance shall be examined and determined in orderly judicial proceedings."

Clearly, an examination before an immigration officer is not a judicial proceeding. And in the commentary on the Immigration and Nationality Act, the Legislative Assistant to the Committee on the Judiciary of the House of Representatives stated: "All proceedings designed to cause the revocation of naturalization must be instituted by a United States Attorney, in a Court authorized to naturalize aliens in the judicial district in which the naturalized citizen resides at the time the suit is brought." 8 U. S. C. Page 87.

In Section 287 of the Immigration and Nationality Act, the powers of the immigration officers and employees are defined. If Congress intended to give immigration officers the right to subpoena a naturalized citizen to obtain information in connection with possible denaturalization proceedings, it would have written it in this section. Its absence suggests that no such power was ever intended by Congress.

The Government's main prop is that Section 235 (a) is a general grant of subpoena power (U. S. Br. 27), since it could not contend that it was written specifically for denaturalization purposes. The prop, however, is a broken reed, for Congress was obliged *to specifically grant the power to subpoena* in Section 335 (b) for pre-naturalization examinations. If the general power to subpoena existed as contended by the Government, by virtue of Section 235 (a), this separate grant in Section 335 (b) would not have been necessary.

3. Changing the former word "alien" to "person" as the pertinent legislative history[7] makes clear, although ignored

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[7] "* * * In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, air-

by the Government, merely broadens the right to question those persons who might claim that they are citizens but whom the immigration officer "believes or suspects to be aliens."

The addition of the phrase: "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," is as the literal

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craft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The Immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through, or reside in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It is not intended by this provision to sanction the indiscriminate questioning or harassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to become expatriated. Immigration officers are also granted the power to subpoena the attendance and testimony of witnesses and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officer to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer. * * *" S. Rep. No. 1137, 82d Cong. 2d Sess., p. 27; H. Rep. No. 1365, 82d Cong. 2d Sess., p. 55.

[fn] In the document entitled, "Original of Analysis on S. 3455, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and For Other Purposes," there appears the following discussion of Section 235 (a) (pp. 235-4 and 235-5):

> "The second objective which the Service would like to see accomplished in connection with this subsection (Section 235 (a) is to provide specific authority to administer oaths and to question not only aliens who seek to enter the United States, but also nationals of the United States, and to compel testimony by subpoena in such cases. * * *"

Obviously the subpoena power was sought only to question persons seeking to enter the country. **Barber v. Gonzales**, 347 U. S. 637.

language and the legislative history shows, a mere "housekeeping" provision* for the Service.

The Government concedes that denaturalization proceedings were not specifically referred to in the documents, as indeed it must (U. S. Br. 18-21). Probably, the various Courts of Appeals in considering the effect of this phrase, did not have access to these legislative documents; a not unusual situation. See concurring opinion of Justice Jackson in *United States v. Public Utilities Commission*, 345 U. S. 295, 319.

Furthermore, the doctrine of *ejusdem generis*, which is here applicable, declares that where general words follow specific words in an enumeration, describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. The Government seeks, however, to expand the meaning of this *phrase* so that it should in effect read, "or" proceedings to obtain testimony from a naturalized citizen in order to determine whether possible grounds exist for denaturalization proceedings against him.

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*In the document entitled, "Initial Draft of Report on S. 716, Chapters 4, 5, 6 and 7 of Title II" prepared by the Service for use of the two congressional committees at the time the bill which became the final Act was being considered, it was stated (pp. 235-3 and 235-4):

It is to be noted that section 235 (a) specifically provides that not only immigration and special inquiry officers but also the Attorney General shall have the power to administer oaths, to take evidence and to issue subpoenas. By vesting such powers in the Attorney General, this will make certain that the Attorney General will be in a position to delegate such power to any employee of the Service, as provided in section 103.

* * * * * * * * * * *

In addition, this sub-section contains a provision permitting inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act, and the administration of the Service. These provisions will be of great value in connection with such matters as, for example, investigation of applications for admission to practice as attorneys or representatives before the Service and the Board of Immigration and Appeals.

But when a choice has to be made between two readings, it is appropriate in a denaturalization proceeding not to choose the harsher alternative unless Congress has spoken in plainer words. *Mandoli v. Acheson*, 344 U. S. 133.

4. Finally, even if the literal language of Section 235 (a) were to yield to the meaning sought by the Government in its sixty page brief, "There are times when even the literal expression of legislation may be inconsistent with the general objectives or policy behind it, and on the basis of the equity or spirit of the statute, the Courts rationalize a restricted meaning of the letter." [9]

This Court has wisely declared:

> "It is the duty of the courts under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter is not within the intention of the legislature, and therefor cannot be within the statute." *Holy Trinity Church v. United States*, 143 U. S. 457, 472 (1892). See *Markham v. Cabell*, 326 U. S. 404, 409 (1945).

This doctrine of equitable construction of statutes familiar in Anglo-American law, is particularly appropriate to prevent the injustice, the hardship, and the absurd result which would be the consequence of a literal application of the law in the case at bar.

The Immigration and Nationality Act provides a method whereby if good cause exists for revocation of naturalization, the Government may institute proceedings in "any court." It does not provide a method whereby the naturalized citizen may be re-examined over and over again by the Immigration and Naturalization Service in connection

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[9] Sutherland, Statutory Construction (3d Ed.), Section 6006. In **United States v. Carbone**, 327 U. S. 633, 637, the term "Whoever" as used in the Anti-Kickback Act was construed in the context of the entire statute so as to exclude union officials.

with the "possible institution of proceedings seeking the revocation" of his naturalization.

The Government is here attempting to treat a naturalized citizen as if he were still an alien.[10] We submit that naturalization cuts the umbilical cord that binds an alien to the Immigration and Naturalization Service.

II.

Congress may not under our separation of powers theory of government constitutionally grant to an immigration officer the power to subpoena a naturalized citizen to appear and testify before him in order that a determination be made whether the possible grounds exist for the institution of proceedings seeking the revocation of his citizenship.

In 1881, the Supreme Court declared in *Kilbourn v. Thompson*, 103 U. S. 168, 191, that all powers of Government are divided into executive, legislative, and judicial, and that it is "essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own determination and no other. * * *"

The judicial power of the United States is vested in our Courts, Article III of the Constitution. "The function of admitting to citizenship has been conferred exclusively upon Courts continuously since the foundation of our Government. * * * The judgment entered, like other judgments of a court of record is accepted as complete evidence of its

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[10] There is a difference, ignored by the Government, that is responsible for its misinterpretation of the decisions in **Loufakis v. United States**, 81 F. 2d 966 (C. A. 3); **Graham v. United States**, 99 F. 2d 746. See **United States v. Vivian**, 224 F. 2d 53, 56 (C. A. 7).

own validity unless set aside. It may not be collaterally attacked." *Tutun v. United States*, 270 U. S. 568, 576, 577; *Sherrer v. Sherrer*, 334 U. S. 343.

This subpoena action by the immigration inspector is an attempt to obtain testimony from the successful party in a prior judicial case in order to possibly institute proceedings to reopen this judgment. This is clearly a collateral attack by an immigration officer on the judgment of naturalization rendered in a Court and violative of the fundamental principle of separations of powers set forth in the Constitution. No matter with what glorified perfume the Government seeks to spray its action, it is clearly an encroachment on the judicial process.

This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant, we are dealing here with a court decree. In acting upon the original petition for naturalization the Naturalization Court exercised a judicial power. If the Government wishes to re-examine the judgment granting a certificate of citizenship after that judgment has become final, it has a remedy under Section 340 of the Immigration and Nationality Act.[11]

It has been long established that in our system of separated powers the regulation of immigration is exclusively in the hands of Congress and the Executive. *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892); *Lem Moon Sing v. United States*, 158 U. S. 538 (1895). This plenary power has been called a "fundamental attribute of sovereignty" and "indispensable to the national welfare and safety." Gordon, The Immigration Process and National Security, 24 Temple L. Q. 302, 303 (1951), knowing no limitations other than those which are self-imposed. Thus the judiciary has no voice on whether or not to exclude or admit a given alien. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950).

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[11] The authority of the Courts to denaturalize is not even dependent on statute. Roche, Pre-statutory Denaturalization, 35 Corn. L. Q. 120 (1949).

But it has also been long established that "under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." *Luria v. United States*, 231 U. S. 9, 22. The priceless benefits of that status should not be endangered or taken away without the clearest sort of proof under *rules of evidence*, as applied in Courts. "The difference in security of judicial over administrative action has been adverted to by this Court." *Ng Fung Ho v. White*, 259 U. S. 276, 285.

The Government contends that the doctrine of *United States v. Morton Salt Co.*, 338 U. S. 632 and the fact that the language of Section 235 (a) defining the investigative subpoena power follows the forms used in other statutory provisions, is proof that the Immigration and Naturalization Service has the power to issue subpoenas to obtain information from a naturalized citizen *about himself*. The reliance of the Government here is badly misplaced.

In the *United States v. Morton Salt Company*, supra, at pages 638, 639, Justice Jackson speaking for this Court declared:

> "It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission. Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility 'to initiate contempt proceedings for the violation of this decree.' This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding. The decree also required the original report showing the manner and form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on

its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established."

The Immigration and Naturalization Service has no such "continuing duty" by statute to check on citizens who have become naturalized. The entry of a judicial decree conferring citizenship is final and absolute. Congress did not leave to the Immigration and Naturalization Service the "residual duty" to determine whether the decree had been secured by fraud. A judicial remedy was specifically provided for revocation proceedings in Section 340 of the Immigration and Nationality Act.

Furthermore, in *United States v. Morton Salt Company*, supra, at page 649, this Court stated:

> "Respondents are in a class subject to inquiry, the call is for what appears to be a special report, and the matter to be reported would seem to be as the business conduct and practices about which the Commission is authorized to inquire."

"Witnesses" as used in Section 235 (a), is specifically limited to investigations against persons whom the Government believes are not citizens. The subpoena provisions in 15 U. S. C. 49 (Federal Trade Commission Act) reads, "relating to any matter under investigation". But the matter under investigation must be within the jurisdiction of the agency. The Federal Trade Commission cannot subpoena

a citizen to determine whether to institute denaturalization proceedings. The Immigration and Naturalization Service cannot subpoena a person to determine whether he is engaged in an unfair method of competition.

Obviously, the Immigration and Naturalization Service has no authority to subpoena a person for an examination to discover how he obtained his citizenship—the "matter" is simply not in the class subject to its inquiry—and such usurpation of power is unconstitutional. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 421; *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 25. Statutes should be construed so as to avoid the danger of unconstitutionality. *American Communications Asso. v. Douds*, 339 U. S. 382.

If an agency has quasi-judicial powers to hold hearings and issue orders and decrees, it usually has the authority under the statute creating the agency to subpoena witnesses in order to carry out the duties delegated by Congress. The Government admits that the formal hearing, "In itself it results in no adjudication or 'decision' of any kind" (U. S. Br. 31). But since the Immigration and Naturalization Service has no statutory authority to hold hearings and issue decrees concerning the revocation of the citizenship of a person who is actually a citizen, it cannot issue subpoenas to the party involved in his own denaturalization proceeding. Such proceedings are Judicial and not Executive.

We submit, that Congress may not provide that a judgment of naturalization rendered in 1945, by an exercise of judicial power under Article III of the Constitution, be re-examined in any way by an immigration inspector by a statute enacted in 1952. The power to grant and revoke citizenship is lodged exclusively in the Courts. *Bindczyck v. Finucane*, 342 U. S. 76.

III.

The application of the above subpoena power is here a violation of due process.

If the essence of due process is "fair play",[12] compelling a citizen many years after he has been naturalized to supply his own dossier to an immigration officer conducting a denaturalization investigation shockingly violates our American concept of "fair play."

Immigration officers could subpoena over and over again a naturalized citizen—perhaps one who has obtained his citizenship over their objections—in order to find "good cause." Res judicata would not apply to such administrative actions. After citizenship was conferred upon respondent by a judicial decree, to attempt to deprive him of the full benefit of that decree in this non-judicial proceeding, is a "taking" of his liberty without due process.

This Court should not construe Section 235 (a) in such manner that compels naturalized citizens to defend in an immigration officer's examining room their right to citizenship won in the court room. In *Schneiderman v. United States*, 320 U. S. 118, 122, Justice Murphy recognizing the priceless value of citizenship declared:

> "* * * the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many

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[12] **Galvan v. Press**, 347 U. S. 522, 530.

it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, whatever may be the rule in a naturalization proceeding (see United States v. Manzi, 276 U. S. 463, 467, 72 L. ed. 654, 655, 48 S. Ct. 328), in an action instituted under 15 for the purpose of depriving one of the precious right of citizenship previously conferred, we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. * * *"

To create another Ellis Island—for naturalized citizens only—is clearly a violation of due process.

CONCLUSION.

Although immediately we are concerned with only one person, the respondent, actually millions of naturalized citizens would be subject to continuous microscopic examinations by the Immigration and Naturalization Service officials from which the native born would be exempt. Even if such discrimination were constitutional, we believe that a clearer statutory mandate than the one the Government relies on is necessary for such enormous power.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX.

Constitutional provisions, pertinent provisions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 et seq., are as follows:

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

AMENDMENT V.

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

Section 101(a)(18):

The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

Section 103(a):

The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or

diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling: He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. * * *

Section 234:

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. If medical officers of the United States Public Health Service are not available, civil surgeons of not less than four years' professional experience may be employed for such service upon such terms as may be prescribed by the Attorney General. Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under

medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1)-(4) or (5) of section 1182 (a) of this title, and the services of interpreters shall be provided for such examination. Any alien certified under paragraphs (1)-(4) or (5) of section 1182 (a) of this title, may appeal to a board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and any such alien may introduce before such board one expert medical witness at his own cost and expense * * *

Section 235 (a):

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien

to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien, and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, re-enter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this sub-section or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Section 236:

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this sub-section) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357 (b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225 (c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attor-

ney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 1225 (c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded from admission into the United States under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) If a medical officer or civil surgeon or board of medical officers has certified under section 1224 of this title that an alien is afflicted with a disease specified in section 1182(a)(6) of this title, or with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1)-(4) or (5) of section 1182(a) of this title, the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision a special inquiry officer. If an alien is excluded by a special inquiry officer because of the existence of a physical disease, defect, or disability, other than one specified in section 1182(a)(6) of this title, the alien may appeal from the excluding decision in accordance with subsection (b) of this section, and the provisions of section 1183 of this title may be invoked. * * *

Section 287:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process

issued by any officer under any law regulating the admission, exclusion or expulsion of aliens.

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, re-enter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search. * * *

Section 340:

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground

that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this sub-section as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(c) If a person who shall have been naturalized after the effective date of this Act shall within five years next

following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

(d) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization; and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time,

through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

* * * * * * * *

Applicability of certificates of naturalization and citizenship.

(i) The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subcourt, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

Power of court to correct, reopen, alter, modify or vacate judgment or decree.

(j) Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court chapter, but to any naturalization heretofore granted by any to take such action. * * *

8 CFR Part 235—Inspection of Aliens Applying for Admission.

8 CFR 235.6 Pre-inspection in certain parts of the United States. * * * The examination shall be conducted in accordance with sections 234, 235, 236, and 237 of the Immigration and Nationality Act and this part and Parts 236 and 237 of this chapter, except that if it appears to the examining immigration officer that any person in the United States being examined under this section is prima facie deportable from the United States, further action with respect to his examination shall be deferred and an application for a warrant of arrest shall be made and further proceedings conducted as provided in section 242 of the Immigration and Nationality Act and Part 242 of this chapter. * * *

8 CFR 340.11 provides:

Investigation and report. Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.